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Supreme Court of the United States

OCTOBER TERM, 1960

No. 388

LENNIS VERRET et al.,
Petitioners

versus

OIL TRANSPORT COMPANY, INC. et al.,
Respondents

OPPOSITION TO PETITION FOR CERTIORARI

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OPPOSITION TO PETITION FOR CERTIORARI

The Facts

Certain omissions from, and inaccuracies in, the statement of facts by the petitioners for certiorari, make it necessary to restate some of the facts, in order to present the case in its proper perspective.

The Towboat *Jane Smith* sank under the circumstances outlined on pages 9 and 10 of the petition for certiorari. Her owner and her charterer petitioned for exoneration from, or limitation of, liability.

Bonds for costs were filed;[1] but since the vessel was an apparent total loss (lying at a depth of ninety feet, at the bottom of the Atchafalaya River), and her strippings had no apparent value, no stipulation for value was filed at that time.

However, each petitioner for limitation stated that it was ready, willing and able to give a stipulation for value, with sufficient security; and each prayed that its interest in the vessel and her strippings be appraised, and that the Court then enter an order fixing the amount of the stipulation to be filed. R 12, 13, 65, 66.

Affidavits filed with each petition showed that the vessel had no apparent value; and the District Court accordingly entered orders to the effect that no stipulations need be filed for the time being, reserving to all claimants the right, at any time, to demand a further appraisement, and the filing of such stipulations as might be shown to be required by such appraisement. R 23-26, 76-79.

Several months after the filing of Oil Transport Company's petition for limitation, the claimants filed exceptions thereto, on the principal ground that no stipulation had been filed. R 50.

On March 29, 1951, the District Court expressly overruled these exceptions, without reservation, and

[1] Contrary to the repeated misstatement in the petition for certiorari. Certified copies of the cost bonds have been filed with the Clerk of this Court.

ordered an appraisement, by two appraisers, of Oil Transport Company's interest in the vessel. R 52-54.

On July 28, 1951, on motion of the claimants themselves, in which the petitioners for limitation joined, the District Court rescinded its order for appraisement, because the vessel had not been raised, and any attempt at appraisal would have been futile. R 107.

On November 19, 1951, immediately after the *Jane Smith* was raised (a year and a half after her loss), the petitioners for limitation filed a stipulation for $25,000, to cover any net value which their interest might be found to have. R 114. On the same day, the District Court entered an order expressly approving the stipulation. R 111.

This stipulation was not challenged for more than five years. Then, on March 26, 1957, the claimants renewed their exception to the petitions, again alleging failure "to give a stipulation, at the time of the institution of these proceedings, as required by law . . ." R 117.

On May 9, 1957, the District Court again expressly overruled the exception, without reservation. R 118.

On August 11, 1958, the petitioners for limitation moved to exclude all claimants but one, from participation in the exoneration or limitation phases of the proceeding, on the ground that, despite the lapse of some eight intervening years, these claimants had

never filed answers, as required by this Court's Admiralty Rule 53, to the petitions for limitation. R 119.

On October 1, 1958, the District Court, having permitted answers to be filed on that date, overruled this motion to exclude the claimants from participation in the proceeding, on the stated ground that "answers have now been filed". R 159.

On May 20, 1959, the District Court entered its order *ex proprio motu*, requiring the petitioners for limitation to show cause why their petitions should not be dismissed on the ground "that said petitioners under the law are required to account in the limitation proceeding for any recovery which may have been realized" in their hypothetical claim against the Texas & Pacific Railroad Company, owner of the bridge with which the *Jane Smith* had collided, and that the petitioners had not prosecuted a claim against the railroad in that regard. R 163.[2]

On June 3, 1959, the rule to show cause was discharged on condition that the petitioners for limitation increase their stipulation from $25,000 to $170,000, an arbitrarily selected figure, being the insured value of

[2] All claimants have themselves sued the Texas & Pacific Railway Co., but they have not brought their actions to trial. If the railroad's fault caused or contributed to the casualty, the claimants can recover their full damages from the railroad directly. As noted by the Court of Appeals, however, the District Court "placed the entire blame" on the master and pilot of the *Jane Smith*. The claimants are, in any event, not entitled to double recovery of their damages. It accordingly appears that prosecution for the benefit of the claimants, of any claim the petitioners for limitation may have against the railroad, could add nothing to the claimants' rights or recovery.

the towboat at the time of the accident.[3] R 170.

On June 11, 1959, the petitioners for limitation filed the increased stipulation (R 172), and it was approved by the Court on June 12, 1959. R 171.

Following trial on the merits, the District Court, although holding expressly that Charles C. Smith Company "is exonerated from liability" (R 1193, footnote 5), and that Oil Transport Company is entitled to limit its liability on the merits (R 1196-1198), nevertheless reversed its three previous holdings that the petitioners for limitation had timely filed adequate stipulations for value, and held that "there was no res before the court (when) six months had elapsed from the time the first claim was filed and, consequently, petitioner's right to limit no longer existed" (R 1194); and the Court thereupon entered an interlocutory decree dismissing both companies' petitions. R 1200.

The Court's decree makes no reference to liability for the casualty. However, in its opinion, it held Oil Transport Company (the charterer) liable on the ground that Captains Weldon and Verret were "each 50%" negligent, in attempting to pass through the bridge at an improper angle of approach. R 1199.

On appeal by the petitioners for limitation (none of

[3] The District Court apparently failed to realize that if either petitioner for limitation was at fault (a prerequisite to the existence of any liability to be bonded in this proceeding), the value of any claim they might have against the Railway could not exceed one-half the value of the towboat. *Halcyon Lines vs Haenn Ship Corporation*, 342 US 282 (1952).

the claimants appealed), the Court of Appeals reversed the District Court's judgment, on the ground that under the circumstances of the vessel's loss, the fact that the stipulation for value was not filed with the petitions for limitation, was not fatal to the petitions.

Certiorari Is Not Warranted

The petition for certiorari presents an aggregate of fourteen stated questions for review (numbered question 4 comprises three stated questions). None of these questions warrants exercise by this Court of its certiorari jurisdiction.

a

Questions 1, 2, 3, 4a, 4b, 4c, 5, 8, 9 and 10 all turn primarily on the question whether the fact that the stipulation for value was not filed with the petitions for limitation, but only when the vessel was salved, was fatal to the petitions.

The negative answer by the Court of Appeals is in full accord with applicable decisions of this Court. In *In re Morrison*, 147 US 14, 34 (1893), this Court held directly that the filing of a petition for limitation of liability, "with the offer to give a stipulation", conferred jurisdiction on the district court, "and no subsequent irregularity in procedure could take away such jurisdiction".[4]

[4] In *Norwich Co. vs Wright*, cited by petitioners for certiorari, this Court again directly classified the matter of the stipulation for value as one of procedure, not jurisdiction: "But in

In *Black Diamond Steamship Corporation vs Robert Stewart & Sons*, this Court reversed the dismissal of a petition for limitation on the ground of insufficiency of the stipulation, because "the defect was not jurisdictional". 336 US 386, 395 (1949).

In the case at bar, the petitioners for limitation initially prayed for an order fixing the amount of the stipulation required, and declared their readiness to give such stipulation as the Court would require; on motion of the claimants themselves, appraisal to fix the amount of any stipulation to be required, was postponed; and the petitioners complied promptly and fully with all orders subsequently entered by the Court as to the amount of the stipulation.

b

Questions 6 and 7 stated in the petition for certiorari—whether the limitation fund should include the value of the *Jane Smith's* barges, and of respondents' putative claim against the railroad bridge—are not presented for decision at this time.

Questions as to the elements and composition of the limitation fund have not yet been determined by the District Court. While the Court of Appeals made some passing comments on these questions, it stated expressly that it was not deciding them.

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order to proceed regularly, the court must have possession of the limited liability fund. . . . (The shipowner) should file a proper petition (and) . . . give due stipulation for such sum as the court may, by proper inquiry, find to be the amount of the limited liability". 80 US 104, 124-25 (1871).

c

Question 12 reads: "Does the evidence justify holding Weldon and Verret (the master and pilot of the *Jane Smith)* each 50% negligent, and petitioners for limitation entirely free from fault?"

Since Oil Transport Company, as charterer of the vessel, was liable under the rule of *respondeat superior* for the negligence of her master and pilot, obviously that petitioner for limitation was not held free from fault by the District Court.

The question whether Weldon and Verret were properly held at fault cannot be raised by the petitioners for certiorari, because they took no appeal from the judgment of the Distict Court. Rule 12, third paragraph, Rules of the Court of Appeals, Fifth Circuit; *International Milling Co. vs Brown Steamship Co.*, 264 F2d 803 (CA 2-1959). This is, in any event, a fact question, as to which see discussion under point *d* below.

d

The final question stated in the petition for certiorari, and that on which the petitioners place greatest reliance, is No. 11—whether the judgment below should not be reversed on the ground that the vessel was unseaworthy for want of a lookout at the head of the *Jane Smith's* tow, with the privity and knowledge of the petitioners for limitation.

This is of course a question of fact, and this Court has frequently declared its disinclination to review fact questions, especially if the courts below are in agreement.[5]

The petitioners for limitation seek to avoid this hurdle by stating that neither of the Courts below passed on the lookout question.

In fact, the question was briefed and argued in, and was passed on by, both the District Court and the Court of Appeals.

It should be borne in mind that in the courts below, the present petitioners for certiorari attacked the vessel's seaworthiness on every conceivable ground—instability, defective rudder, inadequate rudder, lack of sufficient watertight bulkheads, insufficient freeboard, insufficient crew, drunken crew, frayed cables, wooden doors, incompetent master, incompetent pilot, failure "to establish sufficient authority in" the pilot, lack of lookout facilities, broken searchlight, lack of lookout, insufficient life preservers, defective engine, improper make-up of tow, inadequate alarm bell, lack of posted notices to keep doors closed, and failure to hold lifeboat drills.

Thes contentions were not pleaded merely, but were gone into exhaustively at the trial (the record on

[5] See, *e.g. Fry Roofing Co. vs Wood*, 344 US 157 (1952); *Timken Co. vs United States*, 341 US 593 (1951); *Graver Mfg. Co. vs Linde Co.*, 336 US 271 (1949), on rehearing, 339 US 605; *Goodyear Tire & Rubber Co. vs Ray-O-Vac Co.*, 321 US 253 (1944); *Southern Power Co. vs North Carolina Public Service Co.*, 263 US 508 (1924); *Houston Oil Co. vs Goodrich*, 245 US 440 (1918).

the question of liability alone comes to 1214 pages), where their individual and collective lack of merit was clearly demonstrated.

In his written opinion (which properly took the place of formal findings of fact and conclusions of law[6]), the District Judge met this shotgun approach by dealing expressly with only those contentions of unseaworthiness which seemed sufficiently serious to merit discussion. The contention as to lookouts (along with many others) was dismissed without discussion, as patently without merit.

There is no "'arbitrary rule requiring tug operators to maintain a lookout on the lead barge of every tow regardless of the circumstances.' . . . The wording of the (navigational) rule itself . . . clearly reveal(s) that a separate and independent lookout aboard a tug or the lead barge of its forward tow are not inexorable requirements of prudent navigation, but show(s) that the question of competency of a lookout in any instance is primarily one of fact." *Parker Bros. & Co. vs DeForest*, 221 F2d 377, 380 (CA 5-1955), reaffirmed in *Wilson vs Oil Transport Co.*, 242 F2d 727, 729 (CA 5-1957), cert. den., 355 US 835.

The Third Circuit has similarly held directly that in circumstances of clear visibility, it is entirely proper to maintain the lookout from a bridge several hundred feet aft of the bow of a barge under tow (see also

[6] *Hecht, Levis & Kahn vs S/S President Buchanan*, 236 F2d 627 (CA 2-1956).

R 882-83). The Court pointed out further that the party asserting inadequacy of lookout must "show not only that there was an absence of proper lookouts, but also that such a lack of lookouts contributed to the collision". *The Mamei*, 152 F2d 924, 929 (1945), cert. den., 328 US 836. See also *Puratich vs United States*, 126 F2d 914 (CA 9-1942).

In this case, the bridge and the tow were in full view, and clearly lighted by the towboat's floodlight, at all times. R 284-86, 336, 615, 1035. Captain Weldon and pilot Verret, on duty in the wheelhouse, had broad and unobstructed visibility, in better perspective, from a vantage point far more comprehensive than that of a lookout at the head of the tow. Particularly, they were in a better position to judge the angle of approach to the bridge, just as a rifle can be aimed accurately only if both front and rear sights are in the rifleman's line of vision.

The petitioners for certiorari made no showing whatever that the presence of a lookout on the tow would have helped in any way to avoid the accident. There is not the slightest suggestion in the testimony of petitioner Verret, or of any of the other witnesses to the collision, of any causal relation between the casualty and the absence of such a lookout.[1]

Since the District Court's implicit fact finding in this regard was not clearly erroneous, the Court of Appeals

[1] Contrary to the misstatement in the petition for certiorari, the drawspan of the bridge was 160—not 110—feet wide, leaving a clearance of 55—not 30—feet on each side of the flotilla. R 6, 1191.

affirmed it. Rule 52(a), Federal Rules of Civil Procedure. No question is presented for consideration by this court. *Timken Co. vs United States*, 341 US 593 (1951), and the other cases cited in footnote 5 above.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

Eberhard P. Deutsch,
Attorney for Respondents

September, 1960

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 388

LENNIS VERRET, et al.,
Petitioners

versus

OIL TRANSPORT COMPANY, INC., et al.,
Respondents

Petitioners and respondents suggest to the Court that the issues raised by the petition for certiorari herein have been rendered moot by entry, in the District Court, on March 21, 1961, on motion of proctors for all parties to said proceeding, of a final decree (a certified copy of which is annexed hereto, and a copy of which is printed on the reverse hereof) pursuant to the prior decree of the District Court as modified by the opinion of the Court of Appeals heretofore rendered herein, exonerating respondent CHARLES C. SMITH, from liability, and awarding to respondent OIL TRANSPORT COMPANY, INC., limitation of liability, fixing the amount of the limitation fund, and apportioning the fund among claimant petitioners, which decree has been satisfied by payment of the

amounts due thereunder, together with all costs, as per acknowledgment and satisfaction executed by proctors for all claimant petitioners (a certified copy of which acknowledgment and satisfaction is also annexed hereto, and printed on the reverse hereof).

JAMES J. MORRISON
Proctor for Petitioners

EBERHARD P. DEUTSCH
Proctor for Respondents

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

Nos. 503 and 512 (CONSOLIDATED)
IN ADMIRALTY
FINAL DECREE

In re: OIL TRANSPORT COMPANY, INCORPORATED
and
CHARLES C. SMITH COMPANY
Petitioning for Exoneration from,
and Limitation of, Liability

On joint motion of the undersigned proctors of record for petitioners OIL TRANSPORT COMPANY, INCORPORATED and CHARLES C. SMITH, and for claimants, MRS. JEAN D. RANDOLPH, MRS. MONETTE M. LYNCH, MRS. A. W. ASHLEY, MRS. ELIZABETH ASHLEY WORTHEN, MRS. LUCILLE E. WELDEN, MRS. GERTRUDE PICARD CUSHING and LENNIS VERRET,

IT IS ORDERED, ADJUDGED and DECREED that:

1—Petitioner CHARLES C. SMITH be, and he is hereby, exonerated from liability herein;

2—Petitioner OIL TRANSPORT COMPANY, INCORPORATED, is granted limitation of its liability herein, pursuant to the provisions of Sections 183 to 189 of Title 46 of the United States Code, as amended;

3—The limitation fund payable herein by petitioner OIL TRANSPORT COMPANY, INCORPORATED, under the stipulation heretofore filed by it herein, is fixed at the total sum of one hundred forty-seven thousand, three hundred sixty-eight and 00/100 ($147,368.00) dollars, and said fund is apportioned among the claimants herein as follows:

Mrs. Jean D. Randolph	$ 4,000.00
Mrs. Monette M. Lynch	$29,279.50
Mrs. A. W. Ashley Mrs. Elizabeth Ashley Worthen	$16,250.00
Mrs. Lucille E. Welden	$29,279.50
Mrs. Gertrude Picard Cushing	$29,279.50
Plus, for costs, fees and expenses	$10,000.00
Lennis Verret	$29,279.50

4—On payment to the respective proctors of record for each claimant, of the amounts fixed in paragraph 3 of this decree, petitioner OIL TRANSPORT COMPANY, INCORPORATED, and THE HOME INSURANCE COMPANY OF NEW YORK and MARYLAND CASUALTY COMPANY, its underwriters quoad the casualty described in these proceedings, and the Towboat *Jane Smith*, Barges NBC *891* and NBC *892*, shall be and remain forever discharged from

any and all liability, direct, contingent or derivative, for loss, damage, injury or death, and from any further claim, directly or indirectly arising out of, caused by, or consequent upon, said casualty;

5—No other claims having been filed in these proceedings, and all other persons, firms and corporations who or which have, or may have had, any claims, direct, contingent or derivative, for loss, damage, injury or death, directly or indirectly arising out of, caused by, or consequent upon, the casualty described in these proceedings, being in default, they are forever barred from making any such claim against petitioners, the Towboat *Jane Smith*, Barges NBC *891* and NBC *892*, the limitation fund as herein fixed, and THE HOME INSURANCE COMPANY OF NEW YORK and MARYLAND CASUALTY COMPANY, petitioners' underwriters quoad said casualty;

6—The *ad interim* stipulation, and all other stipulations for value, and bonds for costs, heretofore filed herein, are cancelled and released;

7—Each party herein shall bear his or its own costs, and any fees or costs which are, or may be, due to the clerk or marshal of this court, by any one or more of the claimants herein, shall be paid by claimant MRS. GERTRUDE PICARD CUSHING out of her share of the limitation fund fixed in paragraph 3 hereof.

New Orleans, March 21, 1961.

J. SKELLY WRIGHT
UNITED STATES DISTRICT JUDGE

DEUTSCH, KERRIGAN & STILES
Proctors for Petitioners
Oil Transport Company, Incorporated
and Charles C. Smith

BROWNE & RAULT
By GERARD A. RAULT
Proctors for Claimant
Mrs. Jean D. Randolph

RAYMOND H. KIERR
Proctor for Claimants
Mrs. Monette M. Lynch,
Mrs. A. W. Ashley and
Mrs. Elizabeth Ashley Worthen

ARTHUR A. DE LA HOUSSAYE
Proctor for Claimant
Mrs. Lucille E. Welden

JAMES J. MORRISON
Proctor for Claimant
Mrs. Gertrude Picard Cushing

MANDELL & WRIGHT
By JACK C. BENJAMIN and
JACK C. BENJAMIN
Proctors for Claimant
Lennis Verret

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

Nos. 508 and 512 (CONSOLIDATED)
IN ADMIRALTY
ACKNOWLEDGMENT OF PAYMENT AND SATISFACTION OF DECREE

In re: OIL TRANSPORT COMPANY, INCORPORATED
and
CHARLES C. SMITH COMPANY
Petitioning for Exoneration from,
and Limitation of, Liability

Now come claimants, MRS. JEAN D. RANDOLPH, MRS. MONETTE M. LYNCH, MRS. A. W. ASHLEY, MRS. ELIZABETH ASHLEY WORTHEN, MRS. LUCILLE E. WELDEN, MRS. GERTRUDE PICARD CUSHING and LENNIS VERRET, appearing herein through their respective proctors of record, each of whom acknowledges that the limitation fund herein fixed in the total amount of $147,368, and apportioned among claimants as directed in the decree of this court herein dated March 21, 1961, has been paid in full; and each claimant, through his or her respective proctor or proctors of record, acknowledges receipt in full of his or her proper portion of said limitation fund as fixed in said decree, as follows:

Mrs. Jean D. Randolph	$ 4,000.00
Mrs. Monette M. Lynch	$29,279.50
Mrs. A. W. Ashley Mrs. Elizabeth Ashley Worthen	$16,250.00
Mrs. Lucille E. Welden	$29,279.50

Mrs. Gertrude Picard Cushing	$29,279.50
Plus, for costs, fees and expenses	$10,000.00
Lennis Verret	$29,279.50

and each of said claimants, through his or her respective undersigned proctor or proctors of record, hereby authorizes the clerk of this court to enter, in the record of these proceedings, satisfaction of said decree, with all costs.

BROWNE & RAULT
By GERARD A. RAULT
Proctors for Claimant
Mrs. Jean D. Randolph

JAMES J. MORRISON
Proctor for Claimant
Mrs. Gertrude Picard Cushing

RAYMOND H. KIERR
Proctor for Claimants
Mrs. Monette M. Lynch,
Mrs. A. W. Ashley and
Mrs. Elizabeth Ashley
Worthen

MANDELL & WRIGHT
By JACK C. BENJAMIN and
JACK C. BENJAMIN
Proctors for Claimant
Lennis Verret

ARTHUR A. DE LA HOUSSAYE
Proctor for Claimant
Mrs. Lucille E. Welden